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Supreme Court, U.S.
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No. 00-1251

In the Supreme Court of the United States

PAUL M. PERRONE AND DORIS MCCULLOUGH,
Individually and on behalf of others similarly situated,
Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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GMAC boldly asserts that the decision of the Fifth Circuit neither raises an important question of federal law nor conflicts with the decisions of other circuit courts. This is disingenuous.

In the Fifth Circuit, an *amici curiae* brief was filed by the American Financial Services Association, American Bankers Association and Consumer Bankers Association, representing the trillion dollar consumer credit industry (App. G at 47a-49a). The associations petitioned the Fifth Circuit to hear their views on "an issue of widespread importance and concern to banks in the consumer finance industry" (App. G at 49a) and that the "appellate resolution of this issue will broadly affect the consumer finance industry as a whole." (App. G at 49a.) Likewise, GMAC, requested oral argument in the Fifth Circuit "due to the economic significance to GMAC of the issue presented by this appeal." (App. H at 52a.)

Despite GMAC's protestations to the contrary, the split in the circuits is very much apparent. Close examination of the case law, including the district court decisions of the Seventh Circuit (which GMAC cites in its attempt to undercut the efficacy of *Gibson v. Bob Watson Chevrolet GEO, Inc.*, 112 F.3d 283 (7th Cir. 1997), reveals a legal morass of authority. In sum, the cases cited in GMAC's Opposition demonstrate three separate and conflicting judicial approaches to class claims for TILA actual damages/detrimental reliance.

First, there is the Seventh Circuit *Gibson* decision which holds that reliance is not necessary to state a claim for TILA actual damages. In *Gibson,* the Seventh Circuit found that "the purchaser thinks he will have to pay $800 for an extended warranty, whether he pays cash or buys on credit; whereas, if the retention is really smaller on cash purchasers

than on credit purchases, and the third party's fee net of the retention is the same, the customer will not have to pay $800 if he pays cash for the car. This is the type of fraud that goes to the heart of the concerns that actuate the Truth in Lending Act," citing *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 366-68, 93 S.Ct. 1652, 1659-60, 36 L.Ed. 2d 318 (1973).

Second, there are cases which impose the requirement of detrimental reliance and effectively foreclose any possibility of a TILA class for actual damages. *See, Perrone, et al v. GMAC*, 232 F.3d 433 (5th Cir. 2000); *Turner v. Beneficial Corp.*, __ F.3d __, 2001 WL 172432 (11th Cir. Ala. 2/22/01) (*en banc*); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000).

Third, there are post-*Gibson* court cases from the Seventh Circuit which GMAC asserts support its position that detrimental reliance is required; however, some of those cases take a blended approach to the issue: they certify the class as to liability on actual damages while decertifying the causation/reliance issues, then allow for proof of reliance by presumption or inference. *See, Hoffman v. Grossinger*, 1999 WL 184179 (M.D. Ill. 1999), where, like *Johnson v. Aronson Furniture Co.*, No. 96-C-117, 1998 WL 641342 (N.D. Ill. 9/11/98), the Court certified the class on defendant's conduct and liability while declining to certify issues of causation and actual damages. Quoting from *Califano v. Yamaski*, 442 U.S. 681, 701, 99 S.Ct. 2545, 2557, 61 L.Ed. 2d 176 (1979), "we find that permitting Grossinger's liability to be determined on a class basis, 'saves the resources of both the Court and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'"

This is a far cry from the Court in *Perrone* which eliminated all class actions for actual damages, holding they could not exist because of the individualized reliance requirement. Thus, the split of the circuits is real. The Eleventh Circuit in *Turner* and Fifth Circuit in *Perrone* have effectively destroyed TILA class actions with respect to actual damages. The Seventh Circuit in *Gibson* held that reliance was not an issue. Thus, the very district court cases out of the Northern District of Illinois which GMAC claims support its position do not. Further, in *Aronson,* the Court specifically held that there was no need for individualized hearings because of the standard form contract. Therefore, *Aronson* applied either a presumption or an inference of reliance.

To complicate matters further, the Fifth Circuit is in conflict with itself. The Court in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970 (5th Cir. Tex. 10/27/00), in stark contrast to the *Perrone* Court, held that certifying a class should be done on a claim-by-claim basis rather than holistic basis in order to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members.

The *Bolin* Court addressed the issue of TILA authorizing an award to the class of actual damages and stated that unwinding various settlements or *refunding overcharges* (emphasis added) pursuant to an illegal reaffirmation agreement may not require calculating the damages of each class member; rather, proof of prior payment for the amount of damages would be predetermined. Nonetheless, computation of some components of actual damages (at p. 978) may require more individualized treatment, such as determining expenditures made by class members in defending against Sears' actions.

Thus, the *Bolin* Court, when confronted with TILA actual damage claims, determined that some would require individualized treatment and some would not. Tellingly, the *Bolin* Court indicated that "refunding overcharges" would be *predetermined* in contrast to those actual damages claims which may require more individualized treatment. The *Perrone* Court did not even consider the rote nature of the Petitioners' actual damage claims (an alleged uniform overcharge of $400) equivalent to the amount petitioners were charged for an upfront "acquisition fee" which was neither identified nor disclosed.

Likewise, GMAC's citation to *Bizier v. Globe Financial Services, Inc.*, 654 F.2d 1 (1st Cir. 1981) only supports petitioners' contention that the circuits are in conflict. The *Bizier* Court held that the prophylactic design of TILA's private attorney general scheme required that liability be imposed. Appellants in that case had sought only the limited statutory remedy of Section 1640(a)(1) which was noted by the Circuit Court as providing a far less drastic and expensive remedy than might an award of actual damages under Section 1640(a)(2). The *Bizier* Court went on to hold in dicta that "in actions of the latter type, *such conventional contract-law elements as damages and causation must be shown in addition to a threshold showing of a violation of a TILA requirement* (emphasis added)." *Id.* at *4.

While the above quote is not binding, the First Circuit in *Bizier* had it right: actual damages claims under TILA should employ conventional contract law elements of damages and causation. In *Mourning*, Mr. Justice Douglas (with whom Mr. Justice Stewart and Mr. Justice Rehnquist concurred, dissented in part) citing Corbin on Contracts, expressed his view "that a proper resolution of the issue whether respondent extended credit to petitioner depends, at least in part, on the

contractual relationships between the respondent and the publishers." *Mourning* at p. 380.

Causation is not the same as detrimental reliance and should not be confused; nonetheless, the *Perrone* Court imposed a "but for" causation test, then equated it with the requirement of detrimental reliance. If *Bizier's* dicta were followed, then the Courts would employ conventional contract law elements for proof of damages and causation in an actual damages claim under TILA. Thus, the First Circuit has indicated a far different standard of proof regarding actual damages than the Fifth Circuit in *Perrone* and the Eleventh Circuit in *Turner*. Accordingly, the *Bizier* Court provides for more confusion and disharmony among the circuits, not less.

Clearly, any future TILA litigants seeking class certification of actual damages claims in the First Circuit would most assuredly cite to *Bizier* in support of a less stringent burden of proof than has been meted out in *Perrone* and *Turner*. For where agreements are supported by adequate consideration, there is no need to rely on notions of detrimental reliance. *See, FDIC v. Patel,* 46 F.3D 482 (5th Cir. 1995); *Mills v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 305 (8th Cir. 1983); Restatement (Second) of Contracts, Sec. 90 (1981).

The Eighth Circuit in *Peters* held that the proper analysis for determining actual damages was that the plaintiff had to show (1) that he read the TILA disclosure statement; (2) he understood the charges being disclosed; and (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price but did no in-depth analysis as to why that was the rule. The dissent in *Peters* criticized the majority holding, and citing *Gibson,* stated that Judge Posner made it crystal clear a TILA

plaintiff need not show he would have sought and could have obtained a lower price on the dealer-offered service in order to state a claim.

GMAC also claims that the Sixth Circuit requires reliance, availing itself of the holding in *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000). In the *Stout* case, however, class certification was denied outright because of a finding that the discrepancies between plaintiffs and the ostensible class members ranged from the type of car, the degree of repairs necessitated, the response to those repairs, the purpose for which the car was purchased, the individual circumstances and transaction surrounding each purchase, including each class member's understanding of the terms and conditions of the purchase agreement and the extent of the injuries suffered, citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). The facts of *Stout* bear no resemblance to the facts of *Perrone*, where the only issue is GMAC's nationwide practice of non-disclosure of an "acquisition fee" of $400 in a standard form lease agreement, amounting to a several hundred million dollar overcharge.

Likewise, the recent decision *en banc* of *Turner v. Beneficial Corp.*, __ F.3d __ 2001 WL 172432 (11th Cir. 2001), decided since the time of the filing of the Petitioners' writ application herein, sheds no more light on the issue. The *Turner* Court simply regurgitated the holdings of *Perrone* and *Peters*, *supra*, and other district court decisions in support of its position. There was no rigorous examination of statutory construction principles and when it discussed legislative history, the *Turner* Court erred by giving any consideration to HR 193, 104th Congress, First Sess. 1995 as to the intent of Congress regarding "actual damages." The 1995 amendments to TILA did not amend or affect the actual damages provisions in any way. The remarks were simply

gratuitous. Congressional comments in 1995 as to how Congress intended the TILA actual damages provision to be implemented carries no significance whatsoever.

If any legislative history is to be reviewed, then the Court must look to S Rep. No. 720, 95th Congress, Second Sess. 12 (1978) and S Rep. No. 73, 96th Congress, First Sess. 13 (1979) regarding the agency enforcement provisions relating to restitution. The agency enforcement provisions were made retroactive to the date of enactment of actual damages and as such, were statutorily woven into the fabric of the civil liability section of TILA regarding actual damages. In a period leading up to the amendments, those two congressional committee reports explicitly stated that civil liability for actual damages was "the equivalent of restitution adjustments."

Turner and *Perrone* in error decertified the claims *in toto*, allowing no type of presumption or inference of reliance or proof of standardized reliance. There was no discussion as to Rule 23 implications or debate as to how claims of this nature would best be served by a class action. Both decisions glossed over the precise TILA statutory language these decisions rendered useless, superfluous and absurd, that being the TILA provisions which (1) mandate the courts to maintain class actions for actual damages and (2) provide that no consumer shall pay in excess of an amount actually disclosed. See paragraph following § 1640(a)(4) and § 1640(b). Furthermore, this Court in *Beach v. Ocwen Federal Bank,* 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed. 2d 566 U.S. (Fla. 1998), discussed interpretation of a clause in the TILA statute. "The section's uncompromising statement that the borrower's right *'shall expire'* (emphasis added) with the running of time manifests a congressional intent to extinguish completely the right of recision at the end of the three-year

period. There is no reason then even to resort to the canons of construction ..." Similarly, the language "shall consider" contained in the paragraph which follows § 1640(a)(4) evinces the same unequivocal congressional intent to maintain class actions for actual damages under TILA. The language cannot be interpreted in any other way.

GMAC also relies heavily upon the case of *McCoy v. Salem,* 74 FRD 8 (E.D. Mich. 1976) (as did the *Perrone* Court) which held that "while the statute itself and the legislative history both suggest that Congress intended actual damages as a class action remedy for Truth in Lending violation, this Court is convinced that the actual damage claims of class members must be resolved on an individual basis." That one sentence illustrates that the *McCoy* Court substituted its own opinion for the will of Congress, an act which this Court has time and again held impermissible.

In *Ford Motor Credit v. Cenance,* 452 U.S. 155, 101 S.Ct. 2239, 68 L.Ed. 2d 744 (U.S. La. 1981), this Court held that absent clear indication of legislative intent to the contrary, statutory language controls TILA's construction and, in addition, regulations promulgated by governmental body responsible for interpreting or administering statute are entitled to considerable respect, citing *Ford Motor Credit v. Milhollin,*444 U.S. 555, 567, 100 S.Ct. 790, 63 L.Ed. 2d 22 (U.S. Or. 1980), which held that TILA's statutory provision "signals an unmistakable congressional decision to treat administrative rule-making and interpretation under TILA as authoritative."

Likewise, in *Anderson Brothers v. Valencia,* 452 U.S. 205, 101 S.Ct. 2266, 68 L.Ed. 2d 783 (U.S. Ill. 1981), "as we emphasized in *Milhollin*, the task of striking the proper balance is an empirical process that entails investigation into

consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are better suited than the courts to engage in such process." 444 U.S. at 568-69, 100 S.Ct. at 798-99. *Anderson* held that by ignoring the Federal Reserve Board's definition of "security interest," the lower court erroneously relied on an unofficial staff interpretation which by its own terms was entitled to no weight whatsoever, an action which it had no right to do.

Petitioners assert that the *Perrone* Court's substitution of its own opinion regarding what importance a consumer may or may not attach to certain disclosures was erroneous, as well as its reliance upon *McCoy*. The Federal Reserve Board, in promulgating Regulation M, specifically 12 C.F.R. 213.4(g)(2), Official Staff Commentary and Model Lease Forms, deemed itemization and/or identification of up front fees paid by lessees important. The *Perrone* Court had no authority to second-guess Congress or the Federal Reserve Board.

Further, the *McCoy* Court, in addition to rewriting the TILA class action actual damages provision to its own liking, also directly contradicted this Court in *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 366-68, 93 S.Ct. 1652, 1659-60, 36 L.Ed. 2d 318 (1973). The *McCoy* Court held that TILA plaintiffs were not entitled to the presumption in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed. 2d 74 (1972) because "unlike 10(b)(5), the roots of Truth in Lending are not in protection against common law fraud." *McCoy*, at *13.

The logic of *McCoy* flies in the face of *Mourning v. Family Publications*. In *Mourning*, this Court found TILA's purpose to be two-fold: to facilitate the consumer's acquisition of the best credit terms available and to protect the consumer

from divergent and at times fraudulent practices stemming from the uninformed use of credit. *Mourning* at 363, citing HR Rep No. 1040, 9th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong., 1st Sess., 1-2, 1967. The *Mourning* Court also recognized that when Congress originally enacted Truth in Lending, the use of consumer credit was expanding in an extremely rapid rate. Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the cost of deferring payment because of the divergent, and at times, fraudulent practices by which consumers were informed of the terms of the credit extended to them. Congress was well aware from its extensive studies of the possibility that merchants could use devices to evade the disclosure requirements of the Act.

Therefore, it cannot be disputed that the roots of Truth in Lending, like the roots in 10(b)(5), are in protection against common law fraud, although TILA requires no proof of fraud in order to recover statutory or actual damages for disclosure violations. Thus, *McCoy* engendered an entire line of bad case law. If the Court in *McCoy* had simply followed the public policy dictates of *Mourning,* there would not be such a divergence of opinions regarding this important issue. Petitioners do not concede that detrimental reliance should not be an element of proof in order to recover TILA actual damages. However, It stands to reason that if TILA were enacted to combat fraud, then there is no reason not to apply the *Affiliated Ute* presumption. This Court has recognized that both TILA and 10(b)(5) actions have their roots in common law fraud. Further, if the issue is of concern to a trillion-dollar consumer finance industry, then the impact of this decision can be of no less importance to the millions of consumers who depend on legislation and the judicial system to protect them. For all these reasons, Petitioners' writ application should be granted.

Respectfully submitted,

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APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

[Filed January 19, 2000]

No. 99-30958

GILBERT V. ANDRY, JR., ET AL., ETC.,	)
Plaintiffs and Appellants,	)
	)
v.	)
	)
GENERAL MOTORS ACCEPTANCE CORPORATION	)
Defendants and Appellee.	)

Motion for Leave to File and
Brief of Amici Curiae
American Financial Services Association,
American Bankers Association, and
Consumer Bankers Association

In Support of Affirmance of an Order of the

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Hon. Ivan L.R. Lemelle, Judge

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[page i]

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The American Financial Services Association ("AFSA"), the American Bankers Association ("ABA") and Consumer Bankers Association ("CBA") respectfully request leave to file the attached Brief of Amici Curiae.

AFSA is the nation's largest trade association representing market-funded providers of financial services to

consumers and small businesses. AFSA's mission is "to assure a strong and healthy broad-based consumer lending services industry which is committed to: (1) providing the public with a quality and cost effective service, (2) promoting a financial system that enhances competitiveness, and (3) supporting the responsible delivery and use of credit-related products." Organized in 1916, AFSA represents about 360 companies operating more than 10,000 offices engaged in extending $200 billion or about 15 to 20 percent of all consumer credit in the United States. AFSA's members include credit card issuers, independently-owned consumer finance companies, diversified financial services companies, and automobile finance companies.[1] They provide a broad range of financial products and services to consumers throughout the United States, including credit card, checking account, and deposit account services, home mortgage loans, home equity loans, retail installment financing, automobile and mobile home financing, and lines of credit.

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The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

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[1] Appellee General Motors Acceptance Corporation is an AFSA member.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The AFSA, the ABA and the CBA frequently appear as amici curiae in cases raising issues of widespread importance and concern to banks and the consumer finance industry.

The amici brief addresses the sole question of whether the "actual damage" provision of the Truth in Lending Act's civil liability section, 15 U.S.C. § 1640(a)(1), (which applies to violations of the Consumer Leasing Act, 15 U.S.C. §§ 1667 et seq., codified as a subchapter of TILA) necessarily includes a *reliance* component. The district court concluded that it does. Appellate resolution of this [page iii] issue will broadly affect the consumer finance industry as a whole, since it could dramatically widen the industry's exposure in all types of TILA litigation.

The AFSA, the ABA and the CBA wish to aid this Court in deciding this important question by presenting the consumer finance industry's perspective. The amici brief focuses on the legislative history surrounding the enactment and refinement of TILA's civil enforcement scheme, and the numerous decisions that cite that history in holding reliance

essential. The AFSA, the ABA and the CBA believe their perspective will shed additional light on the reliance issue.

So far, only district, bankruptcy and state courts have squarely decided the reliance question, all but one in favor of a reliance requirement. In dicta, the First Circuit has also found reliance essential.[2] Because of the importance of the issue, the AFSA, the ABA and the CBA urge this Court to accept their amici brief, which presents more detailed legislative history than the parties' briefs contain.

For all of these reasons, the AFSA, the ABA and the CBA respectfully request that their motion for leave to file an amici curiae brief be granted.

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[2] The Eleventh Circuit is considering the same issue in a pending case, *Turner v. Beneficial Corporation*, case no. 99-13381-F. On December 6, 1999, the AFSA, ABA and CBA moved for leave to file an amici curiae brief in that appeal as well. The Eleventh Circuit recently granted that motion.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed January 3, 2000]

No. 99-30958

GILBERT V. ANDRY, JR.; PAUL M. PERRONE; DORIS MCCULLOUGH, Individually and on Behalf of Others Similarly Situated	)
Plaintiffs - Appellants,	)
v.	)
GENERAL MOTOR ACCEPTANCE CORPORATION	)
Defendant - Appellee.	)

Appeal From United States District Court
for the Eastern District of Louisiana
Civil Action No. 97-2552
Hon. Ivan L. LeMelle, District Judge

APPELLEE'S BRIEF

* * * * *

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REQUEST FOR ORAL ARGUMENT

Due to the economic significance to GMAC of the issue presented by this appeal, GMAC requests oral argument.